IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION.

WRIT PETITION NO.7612 OF 2004

Ramakant Chandrakant Gosavi,
since deceased through L.Rs
smt Shaila Ramakant Gosavi, .. Petitioner

Vs

Pandharpur Municipal Council
and anr. .. Respondents

Mr Umesh Mankapure i/b Mr R.V.More, for the petitioner.
Mr S.S.Patwardhan, for respondent no.1.
Mr K.A.Khande in-person for respondent no.2 present.

CORAM : D.B.BHOSALE,J.

DATE : 16th December, 2004.

PC:

1. Heard the learned counsel for the parties.

2. Rule. Rule returnable forthwith. Mr Patwardhan, learned counsel, waives service for respondent no.1. Mr Khande in-person appears for respondent no.2. By consent, rule is heard finally.

3. This petition is directed against the order dated 3.8.2002, by which application-Exhibit-62 filed by the petitioner-plaintiff in Regular civil Suit no.141 of 2000, has been rejected. By that application, the petitioner had prayed for allowing her to be substituted in the place of her deceased-husband Ramakant

Chandrakant Gosavi, who had filed Regular Civil Suit No.141 of 2000. That application was rejected holding that the suit was filed for perpetual injunction and since the cause of action arose against the deceased plaintiff and not against the petitioner she was not entitled to be substituted as plaintiff in the suit. In view thereof, the petitioner filed an independent suit bearing R.C.S.No.355 of 2002 and in that suit she filed an application Exhibit-5 seeking similar relief as sought in Suit No.141 of 2000. That application, however, ultimately came to be rejected in Civil Misc.Appeal No.101 of 2002 on the ground that a fresh suit on the same cause of action was not maintainable. In view of that, the petitioner has filed the present writ petition. The relevant observations in the order dated 6.4.2004 passed in Civil Misc.Appeal No.101 of 2002 reads thus:

> "(8) Undisputedly Ramaksant Gosavi the late husband of the appellant had filed RCS No.141/2000 and challenged the notice issued by respondent Municipal Council. Chandrakant Gosavi was power of attorney holder of late Ramakant. Chandrakant was the son of Ramakant. It was incumbent upon the son of Ramakant to bring legal heirs on record when Ramakant died during pendency of RCS No.141/2000, as a result the

trial Court was pleased to abate RCS No.141/2000. At this juncture a reference is to be made to the provisions of order 22 Rule 9 of CPC which speak about the effect of abatement or dismissal. Rule 9 of Order 22 CPC says that where a suit abates or is dismissed under this order, no fresh suit shall be brought on the same cause of action. The cause of action for filing RCS No.141/2000 was issuance of notice by the respondent. The present suit filed by the widow of Ramakant through the same power of attorney holder is also based on the same cause of action. Thus, prima facie, it appears that the very suit of the appellant is not tenable under Order 22 Rule 9(1) of CPC. R.C.S.No.355/2002 came to be filed by the appellant because the order of status-quo passed in RCS No.141/2000 came to an end as Ramakant, who was the plaintiff in the said suit, had died. I had asked a pointed question to Adv. Shri Naiknaware as to why no steps were not taken when RCS no.141/2000 came to be abated. It was submitted that the order of the trial Court passed in RCS No.141/2000 is illegal as the right to sue survived. However, whether the order passed by the trial Court in RCS No.141/2000 is illegal or not; fact remains that RCS

No.141/2000 is abated. It was vehemently submitted that the cause of action for the present suit is different than that in RCS No.141 of 2000. I would like to mention that the principles, which are applicable in the decision of the question as to the identity of causes of action, are summarised in a judgment of Privy Council in Mohmad Khalil Khand Vs. Mahebobali reported in AIR 1949 Privy Council page 78. The cause of action has no relation whatsoever to the defence that may be set up by the defendant nor does it depend on the character of the relief prayed for the plaintiff. In my opinion the facts and the relief claimed in RCS No.141/2000 and the facts and the relief claimed in RCS No.355/2000 are very much identical and as such cause of action in both the suits is the same and hence the provisions of Order 22 Rule 9(1) of CPC would come into play and thereby the very suit of the present appellant would not be maintainable. This can be apparently seen from the record of the proceeding and the submissions advanced before me. In view of the same the general principle would apply that what cannot be granted permanently also cannot be granted temporarily. If it is found that the very suit of the

appellant is not maintainable, the question of granting temporary relief would also not arise... ..."

4. Against this backdrop, the petitioner has filed the instant writ petition challenging the order dated 3/8/2002 passed below Exhibit 62 in R.C.S.No.141 of 2000. The petitioner is the wife of the deceased plaintiff who had filed the suit for injunction against the defendants restraining them from obstructing their peaceful possession over the suit property as also from encroaching upon it and demolishing the structure standing therein. Respondent no.2 in-person and Mr Patwardhan, learned counsel for respondent no.1, submitted that the structure has already been demolished and, therefore, cause of action does not survive and therefore, the suit itself is liable to be dismissed. From perusal of the suit, it is clear that the suit was filed seeking permanent injunction restraining the defendants from disturbing their peaceful possession and encroaching upon the suit property and not only for restraining respondent no.1 from demolishing the structure. The petitioner claims that she was in joint enjoyment of the property with her deceased husband. Considering the overall facts and circumstances of the case, in my opinion, the Court below was not right in

observing that the cause of action arose only against the deceased husband of the petitioner and, therefore, she has no right to be substituted in the suit. The impugned order, in my opinion, is wrong and cannot be sustain in law and is, therefore liable to be quashed and set aside. The petitioner-wife has every right to get herself impleaded as plaintiff in the suit. On merits, whether cause of action survives and she is entitled for reliefs claimed in the suit, need not be considered at this stage.

5. In the result, the writ petition is allowed. The petitioner to carry out amendment within four weeks from today. On the petitioner carrying out the amendment, the suit shall stand restored to file. The trial Court to proceed with the further hearing in accordance with law.

. A copy of this order may be made available to the parties.

(D.B.BHOSALE, J.)